January 23, 2015

The Honorable Fred Upton
2183 Rayburn House Office Building
Washington, DC 20515

The Honorable Greg Walden
2185 Rayburn House Office Building
Washington, DC 20515

Re: Regulation of the Market for Video Content and Distribution - Response to White Paper #6

Dear Honorable Sirs,

We believe that provisions requiring PEG access on cable systems are still necessary and warranted today, due to the role that PEG programming plays in communities around the country. Just take as an example BevCam's role in our city, Beverly, MA.

Over the years, BevCam has developed unique working relationships with local civic organizations, non-profits and community groups. Our on location coverage of their various events, workshops and meetings underscore our important role in helping these groups promote their mission and educate the public.

July and August finds us on location at Lynch Park working with the Beverly Recreation Department taping the events surrounding Homecoming. We have regularly taped the annual Polar Plunge (in February) in co-operation with the North Shore CDC, which organizes this event. In late November we partner with the sponsors of the annual Holiday Parade, as we set up in front of City Hall to tape this festive event.

For some 10 years now, we have coordinated with the Red Cross of Northeastern Mass to tape their annual Heroes Breakfast extravaganza. We have partnered with the Beverly Rotary Club to tape their annual North Shore Star event, a major fundraiser featuring local performers competing for awards. At the request of the Beverly Cooperative Bank and other sponsors, we taped the increasingly popular Beverly Gran Prix bicycle race through downtown streets.

BevCam is a Board member of the Greater Beverly Chamber, frequently taping Chamber events like networking sessions and business workshops; the last 4 years we have covered their Beverly Business Awards banquet. We are also members of the Beverly Community Council, and occasionally tape workshops at their luncheons.

We have partnered with Beverly Bootstraps Food Pantry the last 6 years to cover their premier fund-raising event of the year, the Best Chefs competition. At the request of the Beverly Veterans Advisory Committee, we taped a special fishing day outing out of Salisbury, MA for disabled veterans, also sponsored by the Veterans of Foreign Wars.

In addition, our on location coverage of municipal and civic events is far reaching. We broadcast all City Council meetings live from City Hall, and also stream them live over the internet. During election season, you'll find us on location throughout the city covering debates and political forums.

We cover inaugurations, joint City Council-School Committee meetings, and special workshops on bullying and substance abuse. Because it strives to be impartial and objective, BevCam has managed to gain the respect and following of the community as a credible source of information on political matters. It has become a nexus for discussion and debate – a center for the transmission of ideas and gaining of consensus.

These are examples of the impact cable access station BevCam has had on the community… bringing focus to local events, collaboration with fellow civic-minded organizations, involvement of volunteers and service to the community. We take great pride in these roles.

Respectfully,

Walter Kosmowski
Executive Director
BevCam
100 Sohier Road
Beverly, MA 01915

[redacted]

From: [redacted]
Sent: Thursday, January 15, 2015 3:40 PM
To: CommActUpdate
Cc: [redacted]
Subject: Regulation of the Market for Video Content and Distribution - Response to White Paper #6

The Honorable Fred Upton
2183 Rayburn House Office Building
Washington, KC 20515

The Honorable Greg Walden
2185 Rayburn House Office Building
Washington, DC 20515

It's my understanding you will soon be contemplating video reform and the Communications Act. I'd like to share with you the importance of PEG channel resources and allocation and why these resources and allocation should continue to be protected and preserved.

Successful, productive communities are a result of citizens freely exchanging unfettered speech. Simply put, PEG resources help build successful communities by empowering and encouraging citizens to exchange ideas and information to large audiences through traditional and / or innovative media; information important at a local level and most often, important information and ideas not disseminated by any other media at any other level.

While PEG plays an important role in providing individuals the opportunity to disseminate important local information to the community, PEG also provides a space, tools and education to help the community adapt to the ever-changing technological interfaces of cable, television, web and mobile platforms. The complexity of media and its effects upon society are becoming more evident daily. PEG provides users of all ages an opportunity to better understand modern media through shared learning and citizen journalism development.

Through the power of PEG, local municipal governance becomes transparent, local non-profits educate the community of their services, church services are viewed by the disabled, elderly shut-ins view local events, young and old alike gain a better understanding of the workings of multi-platform delivery systems, young and old content creators gain experience and confidence, while many more educational community partnerships and collaborations are formed to work towards the betterment of each unique community.

We at Billerica Access Television, Inc. (BATV) are dedicated to preserving and advancing provisions that encourage and promote the expression of free flowing ideas and speech. To that end, we believe more communication is better than less and encourage users to express themselves utilizing BATV's resources and training programs thru the medium of television and the worldwide web. We at BATV believe freedom of expression and speech are important rights and instead of restricting speech, we encourage open extensive communication while promoting diversity and responsibility.

While we don't know what the future holds, we do know there will be changes in media, its terminology, technology and delivery methods. While you ponder potential amendments to the Communications Act and all its components, please remember to protect the public's needs and interests and provide methods to balance such including PEG, its valuable services and resources and the means to continue delivery of its information.

Lastly, keep in mind that PEG builds local content creators. Content creators communicate. And communication is imperative for a successful, productive community.

Should you have specific questions, I welcome your inquiry.

Sincerely,

Sam Schauerman
Billerica Access Television, Inc.
[redacted]

Like us on Facebook. www.facebook.com/billericaTV

[redacted]

From: Nicki Bishop [redacted]
Sent: Thursday, January 22, 2015 5:13 PM
To: CommActUpdate
Cc: [redacted]
Subject: Regulation of the Market for Video Content and Distribution - Response to White Paper #6

To All for Whom It May Concern:

I am expressing my voice concerning the important role PEG plays in keeping the local voice alive. It gives opportunity for individuals and organizations to express themselves in a variety of formats that usually are not available to them in other media venues. As an example, even local commercial television is reserved almost exclusively for professional voice and opinion. While professionals do participate at times in PEG access channel programming, for the most part PEG avails itself to far more localized programming opportunities to all residents for residents, mutually benefiting neighbors and neighborhoods. It is the voice of the greater populace that will be most unfortunately lost should PEG cease to exist.

Platforms included in PEG programming include: community government meetings, school board meetings, community sports, school events, local competitions, news events, church programs, historical information programs and other key information provided by local Fire and Rescue Depts., Police/Sheriff Depts., road maintenance personnel and more. All of this in addition to programming provided by experts indigenous to the community including medical personnel, business owners, local educators and more.

PEG provides locals opportunity to participate in the process either directly by producing programming of specialized local interest, or by receiving local information via the channels on which PEG programming is broadcast. Without this capability, it will be very difficult and in fact, impossible for most residents to participate.

The Baby Boomer generation continues to be a huge part of the U.S. population (*still underestimated according to this writer*)… most still utilizing the more traditional sources of information through traditional television programming. While the 21st century generation is a social media generation, they too can benefit from video programming produced by local sources that can be readily adapted to the many new social media platforms they enjoy.

I encourage your support of this outstanding venue for the benefit of the local community.

Sincerely,

Nicki Bishop
[redacted]

January 23, 2015

House of Representatives
Committee on Energy and Commerce
Subcommittee on Communications and Technology
2125 Rayburn House Office Building
Washington, DC 20515

Dear Committee Members and Staff:

Block Communications, Inc. ("BCI") hereby submits the attached responses to the Committee's questions regarding the future of television and multichannel video services regulation attached to the Committee's December 10, 2014 white paper.

BCI is a family-owned company with more than a century of experience providing media services to local markets across the country. Founded in the early 1900s as a newspaper company by German immigrant Paul Block, today BCI has grown into a full service, multi-platform media, entertainment, and broadband services company. Through its subsidiaries, BCI

- Publishes *The Pittsburgh Post-Gazette* and *The Toledo Blade* newspapers;

- Operates Buckeye Cablevision, Inc. and MaxxSouth Broadband, which provide video, voice, and data services to approximately 175,000 subscribers in Northwest Ohio, Southeast Michigan, and North Central Mississippi;

- Operates Buckeye Telesystem and Line Systems, Inc., providing voice, data, and cloud services to businesses in Ohio, Michigan, and Pennsylvania;

- Broadcasts local television service through Fox network affiliate WDRB(TV) in Louisville, Kentucky, NBC network affiliates WLIO(TV) in Lima, Ohio, and WAND-TV, Decatur, Illinois, and MyNetwork affiliates KTRV(TV) in Nampa, Idaho, and WMYO(TV) in Salem, Indiana, and through a network of Class A and low power stations in several of its markets.

BCI's presence in the newspaper, broadcast television, and cable broadband services industries gives it a unique perspective on the Communications Act and the government's role in regulating the various services that make up the communications industry.

BCI's media and cable properties make important contributions to the mostly small and mid-sized communities they serve. BCI believes strongly in local service to local communities by companies that are accountable to local citizens. Any revision to the Communications Act should both encourage and reward the commitment to localism that BCI has shown to its readers and viewers for the last century and that it intends to show them for the next century.

BCI strongly urges Congress to use this process to protect viewers and the many small and mid-sized companies like BCI that serve them. Congress's responsibility is to average Americans, not special interests and industry lobbyists. For decades, the Communications Act has helped maintain the viability of the local service model that BCI helped pioneer and continues to practice. While deregulation may be appropriate in many areas, Congress must seek to preserve the statutes and rules that have defined the local character of the American media landscape. So while BCI encourages Congress to take a thoughtful leadership role in reform of the nation's communications laws, it also cautions against the temptation to deregulate for the sake of deregulating. Congress must protect American TV viewers from homogenized national service provided by a few small giant national companies. Any revisions to the Communications Act must guard against the destruction of the traditional local character of America's media services and the extinction of the companies like BCI that have long provided it.

BCI appreciates the opportunity to provide the attached responses to Committee. Please do not hesitate to contact me if you have any questions regarding CEI's response or if the Committee has any follow-up inquiries.

[redacted]

Allan J. Block [redacted]

RESPONSES OF BLOCK COMMUNICATIONS, INC.

1. **Broadcasters face a host of regulations based on their status as a "public trustee."**

   a. **Does the public trustee model still make sense in the current communications marketplace?**

BCI has been in the broadcast business for more than 40 years. Since acquiring WLIO-TV in Lima, Ohio in 1972, BCI has built a small group of television stations serving small and mid-sized markets in Ohio, Kentucky, Indiana, Illinois, and Idaho. BCI has taken its responsibility as a public trustee of its TV spectrum very seriously and has striven to provide all of its viewers with the highest quality news, information, and entertainment programming that could be economically delivered.

The public trust model has sometimes led to burdensome and objectionable over-regulation of broadcast TV services. Nonetheless, the idea of local broadcasters using licensed spectrum to provide free-over-the-air television service to local viewers remains fundamentally sound. There have been many changes to the communications marketplace that should be addressed through changes in law and regulation, as outlined below. But the public trustee model remains viable as an engine for preserving free local television service to all Americans.

Any revisions to the Communications Act should preserve and reinforce the historical model of free local television service provided by local companies that are accountable to the communities they serve.

   b. **Which specific obligations in law and regulation should be changed to address changes in the marketplace?**

Certain broadcast ownership rules are no longer justified in today's competitive marketplace. In fact, some of them harm average American TV viewers. For example, the rules that prohibit ownership of both a broadcast station and a local newspaper in the same market no longer make and sense, if they ever did. Local television stations and newspapers are the main creators and distributors of local news content. But both the local television and the newspaper industry are struggling with changing marketplace realities and the increasing costs of local news production. Rules that prohibit them from combining their resources lead to less news and information programming and a less informed citizenry. Permitting these types of properties to combine would lead to increased and improved local news content. Prohibiting newspaper/broadcast combinations only harms local news consumers and Congress should end this rule.

At the same time, Congress should consider adopting prohibitions on local television station ownership of multiple Big-4 network affiliations in markets where there are a sufficient number of financially healthy stations to support independent major network-affiliated stations. Some local broadcasters' practice of purchasing multiple network affiliations in a single market is distorting local advertising and retransmission consent markets and should be stopped. This practice should be prohibited regardless of whether the broadcaster puts the multiple affiliations on multiple local stations or on digital sub-channels of a single station. Unless a market has two few financially viable stations to support separate network-affiliated stations, the aggregation multiple affiliations by a single station owner in a DMA should be prohibited.

Congress also should consider changes to the law that would limit the use of joint sales agreements ("JSAs") and shared services agreements ("SSAs"). When stations are not financially viable standing on their own, JSAs and SSAs can provide a way to bring poorly performing stations back to economic health. Congress should support the FCC's effective prohibition on the use of JSAs and SSAs to assemble nationwide station super groups in defiance of the FCC's local ownership rules. BCI has included a copy of its most recent advocacy at the FCC on these matters as Exhibit 1.

c. How can the Communications Act foster broadcasting in the 21st century? What changes in law will promote a market in which broadcasting can compete with subscription video services?

The Communications Act can foster broadcasting in the 21st Century by getting back to the basic principle of emphasizing localism. Local television is extremely important to America's democracy. Historically, each local major network-affiliated station has produced independent local news. This led to an amazing amount and diversity of local news content that made the U.S. broadcasting system unique and the envy of the world.

Broadcast television stations have thrived best in an environment where they are a main source of local news and information programming. So Congress should resist calls to eliminate localism protections like the national TV ownership cap and to liberalize the JSA and SSA rules that have led to the creation of near-national station super-groups. Local TV broadcasting works best when it is truly local – not when groups that include dozens of stations feed mass-produced content to all their stations and have is masquerade as "local" programming. Congress should ensure that truly local stations can function in a competitive marketplace that gives every station a fair chance to prosper while serving the public interest.

d. Are the local market rules still necessary to protect localism? What other mechanisms could promote both localism and competition? Alternatively, what changes could be made to the current local market rules to improve consumer outcomes?

The rules defining the local market for television stations remain important to protect the local economic markets of each local station. At the same time, the FCC's interpretation of those rules has led to absurd results and Congress should step in and change that. The FCC's network non-duplication rules currently allow local stations to claim network non-duplication rights even in areas where a network affiliate from a neighboring market is available free over-the-air. For no apparent reason, this rule is different from the rule governing syndicated exclusivity, which prohibits local stations from claiming exclusivity in areas where another station's over-the-air signal is available. This difference in the FCC's enforcement of nearly identical rules leads to inflated retransmission consent fees for some stations and higher cable service prices for consumers. Congress should direct the FCC to change its rules to match viewers' reasonable expectations and Congress's original intent that stations available over-the-air also will be available on local cable systems. BCI has attached as Exhibit 2 a copy of its advocacy to the FCC on this matter and requests that Congress take appropriate action on this issue.

2. Cable services are governed largely by the 1992 Cable Act, a law passed when cable represented a near monopoly in subscription video.

a. How have market conditions changed the assumptions that form the foundation of the Cable Act? What changes to the Cable Act should be made in recognition of the market?

Put simply, cable operators like BCI are no longer anything like "near-monopolies" in their service territories, and they should no longer be regulated that way. Since 1992, competition has proliferated, and today cable operators face substantial competition from DBS providers, telco video providers, overbuilders, and new online video service providers like Netflix and Hulu. In the immediate future, cable operators are likely to face even more competition from pure over-the-top video providers.

This proliferating competition has significant consequences that endanger small and mid-sized cable companies like BCI. As cable operators' share of the market has declined, their bargaining power with programmers has likewise declined. This has led to explosive increases in programming costs. These increases have fallen heaviest on small operators like BCI that lack the scale necessary to obtain volume discounts from programmers that are available to the largest video providers.

Normally, this kind of increased competition is good for consumers, but in this case, while competition has certainly increased consumer choice, it also has had the perverse effect of *increasing* consumer costs as these increasing programming costs are ultimately passed on to consumers. And since these programming cost increases fall heaviest on small and mid-sized and small cable operators serving less populous areas of the country, consumers in small and rural areas are among those hit hardest.

But while our market position has deteriorated, cable television remains by far the most heavily regulated multichannel video programming service. BCI faces far higher regulatory compliance costs than any of its rivals. Again, these costs are ultimately passed on to consumers in the form of higher prices and reduced innovation.

Moreover, the 1992 Cable Act has created a category of retransmission consent expenses that did not exist prior to that statute. Retransmission consent of television broadcast signals is the most rapidly growing cost cable operators face. It now costs companies like BCI $10 or more per subscriber/per month to retransmit all of the over-the-air local television stations that are available free over the air. BCI's television stations and their viewers benefit from this increased revenue and the improved local service it can help foster. But the price of this benefit is sky high for consumers and local cable operators. These stratospheric price increases hurt average American TV viewers and Congress should step in to protect them.

Cable television no longer has any of the characteristics of a local monopoly, so it should no longer be regulated like one. Congress should closely examine every regulatory disparity between cable operators and their MVPD competitors and eliminate as many of those disparities as possible. Cable operators simply should not face any higher regulatory burdens than any of its competitors. If Congress determines that particular regulatory obligations remain appropriate for cable operators, then it should apply those regulations equally to all other MVPD competitors. Any Communications Act rewrite should strive to create as much regulatory parity among MVPDs as possible.

Congress also must take a hard look at the market for cable and broadcast programming. These markets are not free and they are not functioning smoothly for the benefit of consumers. BCI describes below in response to Question #4 some of its recommendations for changes to the law that could result in a fair marketplace that recognizes the changes in the market since Congress last addressed cable television programming issues.

b. Cable systems are required to provide access to their distribution platform in a variety of ways, including program access, leased access channels, and PEG channels. Are these provisions warranted in the era of the Internet?

The 1992 Act's leased access and PEG programming requirements are exactly the kind of monopoly regulation that Congress should examine closely when it amends the Communications Act. In examining these requirements, Congress should determine whether they are necessary in the public interest. Given the opportunities created by the Internet for programmers to reach viewers directly, it seems unlikely that leased access or PEG requirements can be deemed necessary at this time. Nonetheless, if Congress determines that these requirements are necessary, then it should apply them equally to all MVPDs. There is simply no justification in today's competitive market for subjecting cable operators alone to these types of impositions on their valuable distribution capacity.

The program access statute should be revised to strengthen its protections for small cable operators like BCI. For example, the prohibition on unfair competitive practices in Section 628(b) should be applied to all MVPDs and should permit any cable operator to complain to the Commission regarding unfair acts or practices employed by larger MVPDs in local cable markets. Small operators should be protected from larger MVPDs excluding them from access to programming through exclusive programming agreements or extracting unfair volume discounts for programming that result in higher prices for smaller operators like BCI and their customers.

3. Satellite television providers are currently regulated under law and regulation specific to their technology, despite the fact that they compete directly with cable. What changes can be made in the Communications Act (and other statutes) to reduce disparate treatment of competing technologies?

As described above, many legacy cable regulations should no longer be applied to cable operators in today's competitive environment. If Congress decides to retain these regulations, they should, at a minimum, be applied equally to DBS provides and other MVPDs. There is no longer any justification for subjecting cable operators – particularly small cable operators like BCI – to more stringent regulation than Congress and the FCC apply to DBS providers that are nearly ten times larger.

One egregious example of how differential regulation of cable and DBS harms TV viewers is the disparity in the program access rules. Congress has assured DBS providers access to cable programming, but it continues to allow DirecTV – which is about to merge with one of the biggest telecommunications providers in the world – to monopolize NFL programming without saying a word. There is no justification for permitting one of the largest MVPDs to monopolize must-have professional sports programming while forcing cable operators to give that same company access to cable programming.

4. **The relationship between content and distributors consumes much of the debate on video services.**

   a. **What changes to the existing rules that govern these relationships should be considered to reflect the modern market for content?**

Over the past 30 years, Congress and the FCC have protected the interest of content owners at the expense of distributors. The result has been out-of-control wholesale programming price increases and a high rate of inflation for retail services. Content producers have gotten rich at the expense of average Americans. Congress needs to consider changes to the law that will introduce some balance between content owners and distributors. If it fails to do so, an increasing share of MVPD revenues will go to content producers and a shrinking share will go to additional broadband innovation and deployment.

The modern market for programming is heavily tilted against small cable operators like BCI. First, the retransmission consent market is not a "free market" at all. Small cable operators are forced to accept exorbitant prices for retransmission of broadcast stations that essentially have a government-sanctioned monopoly on local distribution of national network programming, even in areas where a network affiliate is available to viewers for free over-the-air. This is unfair, and it results in higher rates for consumers, depressed investment and innovation by small cable operators, and, ultimately, consolidation as small operators seek to increase their size to compete for better prices.

BCI has advocated for changes to the retransmission consent good-faith bargaining rules and the local exclusivity rules that would level the playing field somewhat between small cable operators and local television stations. BCI urges Congress to consider changes to the good faith bargaining rules that would require the FCC to consider whether broadcasters' rate demands are reasonable in light of the ratings that a particular local station generates. It is unconscionable that low-rated television stations should demand that BCI and its subscribers pay top dollar for their signals. Yet that is exactly what happens every day. BCI has attached a copy of its proposals to the FCC for revisions to the good faith bargaining rules as Exhibit 3 hereto.

As described above, Congress also should require the FCC to change the rules allowing a local TV station can claim the exclusive right to distribute network programming even in areas where a network affiliated station in a neighboring market is available free over-the-air. Cable operators should never be prohibited from carrying television stations that are available free over the air. That result is unfair to viewers, results in artificially high retransmission consent fees, and frustrates decades-long viewing patterns. The FCC insists on permitting this abuse of the network non-duplication rules, and Congress should step in to stop this.

The market for cable programming is no healthier than the retransmission consent market. Small operators like BCI are forced to pay higher rates for programming than larger MVPDs, and those price differentials cannot be justified by any rational economic explanation. What is happening is that the largest MVPDs use their bargaining leverage to demand discounted prices and the programmers make up the difference by charging unfairly inflated prices to small operators like BCI. Again, small operators' customers are the victims of this practice when they are forced to pay higher rates to cover the costs. Congress should consider adopting changes to the Communications Act that outlaws this practice of programmers charging small cable operators predatory prices for programming.

Congress should consider restrictions on content onwers' insistence on tying their desirable channels to undesirable add-ons that these owners force on MVPDs. Distributors should be permitted to buy the programming their viewers want and to place it on sensible programming tiers. Content owners should be prohibited from tying their programming together or insisting on preferential tier placement for niche networks with little appeal. Content owners should not be able to shove their content down customers' throats merely because they are so big that MVPDs cannot afford to say no. Today's market is neither free nor fair, and Congress should examine solutions to solve these problems in the interest of protecting average Americans.

b. How should the Communications Act balance consumer welfare with the rights of content creators?

Congress should strike this balance strongly in favor of consumers. The problems with the markets for both broadcast and non-broadcast programming are causing significant consumer harms. People are suffering under the weight of higher costs and lack of choice, and these harms are greatest in the small and mid-sized markets that BCI's cable systems serve. While BCI recognizes the importance of protecting the rights of content owners – indeed, BCI's television stations are content distributors – Congress must recognize that the pendulum has swung too far in the direction of content owners. The current rules favor programming providers at the expense of consumers. That must stop.

5. Over-the-top video services are not addressed in the current Communications Act. How should the Act treat these services? What are the consequences for competition and innovation if they are subjected to the legacy rules for MVPDs?

Congress should not give over-the-top ("OTT") video providers unfair competitive advantages over existing cable operators and other MVPDs. Instead, Congress should seek to treat OTT providers the same as it treats traditional competitors. OTT providers should be subject to the same public interest obligations that Congress decides to continue imposing on other MVPDs. These requirements should include, among others, must-carry, retransmission consent, closed captioning, video description, emergency alert system, V-Chip, and other local or federal licensing requirements. If Congress determines that OTT providers should be free of any or all of these obligations, then it should likewise relieve cable operators and other MVPDs of these obligations.

OTT providers should be required to compete on the basis of price, service quality, and customer service, just like existing MVPDs. The danger of regulating OTT providers differently from existing MVPDs is that Congress would be giving OTT providers important and valuable competitive advantages over companies like BCI with greater regulatory burdens. Congress should not pick winners and losers in the video marketplace, but instead should treat each equally.

Regardless of how Congress resolves the question of OTT regulation, Congress should not create any obstacles to cable operators converting their video services to OTT delivery. If OTT becomes the most efficient way for existing operators to deliver services to customers, cable operators should not be subject to residual regulations due to their previous delivery of traditional cable services.

EXHIBIT

1

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of

2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	))))))	MB Docket No. 14-50
2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	))))))	MB Docket No. 09-182
Promoting Diversification of Ownership In the Broadcasting Services	)))	MB Docket No. 07-294
Rules and Policies Concerning Attribution of Joint Sales Agreements In Local Television Markets	)))	MB Docket No. 04-256

COMMENTS OF BLOCK COMMUNICATIONS, INC.

Keith Wilkowski
Vice President, Business and Legal Affairs
Buckeye Cablesystem
5566 Southwyck Blvd.
Toledo, OH 43614

W.H. Carstensen
President
Block Communications, Inc.
405 Madison Avenue Suite 2100
Toledo, Ohio 43604

August 6, 2014

SUMMARY

In this proceeding, the FCC has a decision to make. It either needs to crack down on practices that are making a mockery of the duopoly rule or it needs to eliminate that rule altogether. Block Communications, Inc. ("BCI") would support repeal of the duopoly rule, but since the FCC's *FNPRM* makes no suggestion that elimination of that rule is even under consideration, BCI strongly urges the FCC to take action against recent industry trends that undermine that rule and effectively punish broadcasters who have played by the rules.

The FCC should use this proceeding to crack down further on the creation of "virtual duopolies" in local markets through the use of new joint sales agreements ("JSAs"), shared services agreements ("SSAs"), local marketing agreements ("LMAs"), or any other arrangements that are designed to destroy the independence of local television stations (collectively, "Service Agreements"). In particular, the FCC should adopt rules that (1) establish standards for when Service Agreements are acceptable based the rules for when duopolies are permissible; and (2) establish an absolute numerical limit on the number of Service Agreements any station group may hold. BCI recognizes that the FCC may conclude that it does not yet have sufficient evidence to establish a permanent cap on Service Agreements. In that case, the FCC should set an interim cap of no more than 15 Service Agreements for any one station group. BCI is confident that an appropriate cap is lower than 15, so setting that as an interim cap is clearly within the FCC authority.

The FCC also should ban the practice of moving major network affiliations to stations' digital multicast channels in markets where there are a sufficient number of full-power stations to

accommodate all network affiliates on a stand-alone basis.[1] The practice of using digital multicasts for dual network affiliations is clearly in the public interest in small markets that do not have enough stations to support all major network affiliations on stand-alone stations. In markets with six or more stations, however, dual affiliations on multicast streams simply lead to a smaller number of viable stations. This will ultimately lead to fewer stations and diminished over-the-air service for average Americans.

Both of these dodges to the duopoly rule distort local advertising and retransmission consent markets. They reduce over-the-air service for everyone while making pay-television more expensive through increased retransmission consent fees. If the FCC wishes to bless virtual duopolies created by Service Agreements or multiple affiliations, it should make that process transparent by repealing the duopoly rule. If it intends to keep enforcing the duopoly rule, then the FCC should ban these practices that reward station groups that push the regulatory envelope while punishing those companies and consumers that play by the rules.

[1] For this purposes, "major network affiliations" should include local affiliation agreements with ABC, CBS, the CW, Fox, MyNetwork, and NBC.

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Federal Communications Commission
Washington, DC 20554

In the Matter of

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2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 09-182
Promoting Diversification of Ownership In the Broadcasting Services	)	MB Docket No. 07-294
Rules and Policies Concerning Attribution of Joint Sales Agreements In Local Television Markets	)	MB Docket No. 04-256

COMMENTS OF BLOCK COMMUNICATIONS, INC.

Block Communications, Inc. ("BCI"), by its attorneys, hereby submits these comments in the above-captioned proceeding.[2]

I. INTRODUCTION

For more than a century, BCI has been serving the information and entertainment needs of communities across the country. Originally founded as a newspaper company in the early

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2 *See* 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership In the Broadcasting Services; Rules and Policies Concerning Attribution of Joint Sales Agreements In Local Television Markets, *Further Notice of Proposed Rulemaking and Report and Order*, 29 FCC Rcd 4371 (2014) (the "*FNPRM*"); *Order*, MB Docket No. 14-50, *et al.*, DA 14-926 (rel. June 27, 2014).

1900s by German immigrant Paul Block, BCI has grown into a full service, multi-platform media, entertainment, and broadband services company. BCI focuses primarily on small and mid-sized markets, publishing *The Pittsburgh Post-Gazette* and *The Toledo Blade* newspaper in Pittsburgh, Pennsylvania and Toledo, Ohio, respectively; operating Buckeye Cablevision, Inc. ("Buckeye"), a small cable company that serves approximately 130,000 subscribers in Northwest Ohio and Southeast Michigan; and providing local television through Fox network affiliate WDRB(TV) in Louisville, Kentucky, NBC network affiliates WLIO(TV) in Lima, Ohio, and WAND-TV, Decatur, Illinois, and MyNetwork affiliates KTRV(TV) in Nampa, Idaho, and WMYO(TV) in Salem, Indiana. BCI also owns several Class A and low power stations through its affiliate West Central Ohio Broadcasting, Inc. These stations provide local network affiliate service to parts of rural Ohio.

For the past 112 years, BCI's company ethos across its media properties has been to provide strong local service to all of its communities. All of the services BCI provides began as local services provided by members of the community that were accountable to the community for the quality of the service they offer. BCI still believes that is the best service model for ensuring that citizens get the information they need to be active and informed participants in this American democracy. And if BCI can offer our customers some entertainment as well, then that is all the better. BCI's "localism, localism, localism" approach has been good for its business and good for its customers.

For decades, the FCC media ownership rules have been designed to maintain the viability of the local service model that BCI helped pioneer and continues to practice. These rules have never been perfect, and BCI has never hesitated to oppose some of them when they stood in the way of improving local service to average citizens.[3] But the national multiple ownership rule and the local duopoly rule have served to check the local and national consolidation of TV stations and markets that easily could have destroyed the diverse local character of TV broadcasting.[4]

That is, those rules have worked that way until recently. For the past decade, a number of broadcasters have used JSAs and SSAs to assemble large -- in some cases practically nationwide – station groups composed in most cases of many local "virtual duopolies." These groups are centered in smaller markets to avoid the national multiple ownership rules.[5] And they avoid the duopoly rule by forming combination JSA and SSA arrangements between a main stations owned by a principal party and a "sidecar" in the same market that is "owned" by a compliant business partner.

A more recent phenomenon the same practical impact involves stations purchasing local market major network affiliations and moving them from stand-alone full-power stations to their own DTV multicasts.[6] Putting a network affiliation on a digital multicast makes sense in small markets where there often are not enough stations to support a stand-alone affiliate for each

[3] *See*, *e.g.*, Comments of Block Communications, Inc., MB Docket No. 02-277, filed Jan. 2, 2003 (arguing for reform of the newspaper/broadcast cross-ownership rule, 47 C.F.R. §73.3555(d)); Comments of Block Communications, Inc., MB Docket No. 06-121, filed Oct. 23, 2006 (same). BCI notes that it continues to support elimination of the newspaper/broadcast cross-ownership rule. The FCC's retention of that rule long past the date when repeal could have benefitted newspaper readers has been an unfortunate failure to serve the public interest. At this point, repeal is unlikely to make any important difference to the television or newspaper industries. Nonetheless, retention of the rule is unjustifiable, and BCI urges the FCC to repeal it.

[4] *See* 47 C.F.R. § 73.3555(b), (e).

[5] BCI does not address the national multiple ownership rule in these comments because Congress removed those rules from the quadrennial review process. Nonetheless, BCI reminds the FCC that action on eliminating the UHF Discount is long overdue and should be completed as soon as possible. *See* Letter from Allan J. Block, Chairman, Block Communications, Inc., to Marlene H. Dortch, Esq., MB Docket No. 13-236, filed Dec. 16, 2013.

[6] For purposes of this discussion, "major network affiliations" include local affiliation agreements with ABC, CBS, the CW, Fox, MyNetwork, and NBC.

network. But today, local stations that already have a major network affiliation are acquiring additional affiliation and putting them on their multicast channels, even when there are plenty of in-market full powers to support independent stand-alone affiliates. This practice has the effect of threatening the viability of full-power stations that can no longer compete for network affiliations and the advertising revenue they promise. Ultimately, this will force stations out of business and off the air. Fewer stations mean less diversity and less localism.

Station groups pursuing these virtual duopoly courses now threaten to the localism and diversity the FCC's rules were designed to preserve. Recently, the FCC began looking into the overuse of these JSA/SSA arrangements, and has been rightly disturbed by what it has found. The FCC's recent decisions to limit JSAs to fifteen percent of advertising revenue and to ban joint negotiation of retransmission consent by non-commonly owned top-4 stations in the same market have been a good first two steps in stopping the abusive use of these arrangements.[7] These and further steps may mitigate some of the damage that JSA and SSA arrangements have caused in local television markets. Remarkably, the FCC has yet to recognize the dangers posed by dual affiliations and proposes not to regulate multiple affiliations on multicast streams.[8] That course must be reversed.

The FCC needs to make a choice: it must repeal the duopoly rule or enforce it. If it repeals the rule, at least local television station will know the rules and can compete accordingly.

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[7] *See* 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *et al.* Further Notice of Proposed Rulemaking and Report and Order, MB Docket Nos. 14-50, *et al.*, FCC 14-28, paras. 340-365 (rel. Apr. 15, 2014) (adopting new attribution rules governing joint sales agreements); Amendment of the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71, FCC 14-29, paras. 24-40 (rel. Mar. 31, 2014) (prohibiting joint negotiations between stations with joint sales agreements); *see also* Processing of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests, Public Notice, DA 14-30 (rel. Mar. 12, 2014).

[8] *See FNPRM*, 29 FCC Rcd at 4398-4400 ¶¶ 66-72.

But if the FCC chooses to retain the duopoly rule, it needs to adopt clear and enforceable rules – and then it needs to enforce them. For too long, the FCC's interpretations of the duopoly rule have favored parties that basically ignore the rule and feign compliance through subterfuge. These broadcasters have profited by the assumption that the FCC will not force stations to comply with the duopoly rule as long as applicants don't misrepresent what they're doing.[9] That standard isn't enough to protect TV viewers or broadcasters that actually play by the rules.

If the FCC decides to keep the duopoly rule in place, it needs to administer the rule in a more straightforward and logical way that actually serves the public interest. That means acting decisively to stop virtual duopolies, whether they are created through JSA/SSA arrangements or dual network affiliations. At the same time, the FCC must act equally decisively to make sure that any actions against JSA/SSA combinations do not lead to stations going off the air and local communities losing free, over-the-air service. To be sure, many of the stations that end up part of a local virtual duopoly are struggling on their own and use JSAs and SSAs to improve station performance and stay on the air. When stations are struggling, JSAs and SSAs might be an acceptable solution, and any FCC's rules should allow for that possibility.

To balance the competing interests of maintaining a full complement of over-the-air television stations in every market with the need to maintain the diversity of ownership and localism that the duopoly rule is supposed to foster, the FCC should take the following next steps:

(1) Enforce the duopoly rule by establishing clear standards for when JSA and SSA arrangements are acceptable and when they amount to attributable station ownership; such standards should take into account that JSAs and SSAs may be appropriate under certain circumstances to preserve local service;

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9 *Cf. RKO General, Inc.*, 78 FCC 2d 1 (1980) (subsequent history omitted).

(2) Adopt an absolute limit on the number of JSAs or SSAs a single station group may own under any circumstances; and

(3) Prohibit stations from acquiring multiple major network affiliations in markets where there are a sufficient number of full-power TV stations available for each major network to operate on a stand-alone basis.

These modest steps are the minimum the FCC can take to ensure the preservation of the local character of the U.S. over-the-air TV broadcasting system.

II. NATIONWIDE STATION GROUPS COMPOSED OF MANY JSA/SSA COMBINATIONS DISTORT LOCAL ADVERTISING AND RETRANSMISSION CONSENT MARKETS.

The FCC's recent decisions looking closely at JSAs and SSAs have revealed that for nearly a decade, these agreements have been used to get around the FCC's duopoly rule. Of course, this should not have been news to the FCC since the agency approved many of these agreements as part of its approval of station transfer applications. What may have been surprising to the FCC is the sheer scope and magnitude of this practice and the problems it is causing. Using JSAs and SSAs to avoid attribution under the duopoly rule has led to virtual duopolies in markets of every size. And this has permitted some TV broadcasters to create the kinds of nationwide station groups that the FCC's rules always were designed to prohibit. Some broadcasters have abused JSAs and SSAs to establish all but total control over dozens of stations nationwide without being considered owners of those stations.

Among the problems with this practice are that it undermines localism and it creates unfair economic advantages for the "virtual duopoly," particularly when the JSA/SSA combination is formed in markets where duopolies otherwise would be prohibited. Allowing for the creation of massive JSA/SSA station groups harms localism because these groups are much less likely to focus their attention on the individual markets they are licensed to serve. Instead, each market becomes a cog in a national machine. These types of station groups have the incentive to provide the best service in their largest markets and to treat smaller markets as little more than revenue-generating afterthoughts.

These arrangements also create unfair economic advantages over other broadcasters in their local advertising markets and over cable operators in their local retransmission consent markets. The FCC already has established that JSAs in excess of 15% threaten to distort local advertising markets by giving the stations selling ads for multiple stations in the market the ability to manipulate prices.[10] And, the Commission has recognized that SSAs requiring coordination of retransmission consent negotiations have a similar impact on local retransmission consent markets.[11]

What the FCC hasn't adequately considered is that when these impacts are multiplied by station groups with a large number of JSA/SSA combinations markets across the country, the result is significantly worse than it appears in any single market. This is because station groups with a large number of markets gain a scale that allows them to essentially dictate terms in any particular market. When no market is essential to the group's operation, the group can essentially dictate terms to local advertisers and MVPDs in local markets. If advertisers and MVPDs resist, the group can spread any losses resulting from the delay in reaching a deal on its terms across its national footprint. The effects are unfair advertising rates and an increased number of retransmission consent disputes. The latter leads inevitably to service blackouts, and, ultimately, higher cable rates for consumers. To remedy these problems, the FCC must take firm steps to stop the aggregation of large numbers of JSA/SSA combinations in the hands of individual station groups.

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[10] *See FNPRM*, 29 FCC Rcd at 4533 ¶ 350.

[11] *See* Amendment of the Commission's Rules Related to Retransmission Consent, *Report and Order and Further Notice of Proposed Rulemaking*, 29 FCC Rcd 3351, 3358-59 ¶ 13 (2014)

III. AS THE FCC MOVES TO LIMIT JSA/SSA COMBINATIONS, IT MUST ENSURE THAT ITS REGULATIONS DO NOT THREATEN OVER-THE-AIR BROADCAST SERVICE.

BCI recognizes that Service Agreements can, in some limited instances, have beneficial effects for both stations and TV viewers. This is particularly the case when these agreements involve stations that are not economically successful and may not be viable in the long term. In such situations, Service Agreements can preserve full service television stations in local markets, which should remain an important FCC goal.

For example, BCI has entered into Service Agreements involving its Louisville station, WDRB-TV, and Louisville CW affiliate WBKI(TV). Prior to the agreements, WBKI(TV) was not performing well financially, and the station has yet to recover fully despite the efficiencies gained by the agreement. Nonetheless, the agreements are a net positive for Louisville TV viewers, WBKI(TV), and BCI because they give the station a fighting chance in an environment that has gotten very difficult for non-Big-4 affiliate stations outside the largest TV markets. Whatever minor loss of independence for WBKI(TV) is counterbalanced by the benefit viewers receive by having this local station on a sounder financial footing. BCI's single Service Agreement relationship in Louisville does not give it the national scale that would permit it to overlook the Louisville market to prove a point with advertisers or local cable operators. Thus, the negative impacts of these agreements are minimal, while their positive impact is considerable.

As the FCC moves to examine and further regulate JSAs and SSAs, it must be careful to preserve agreements that improve the prospects of marginal stations in smaller markets without creating the risks associated with the creation of larger nationwide station groups. The FCC's decades-long dedication to preserving a full complement of local television stations should not be a casualty of the need to reign in JSAs and SSAs. This is particularly important today, when the upcoming incentive auctions already threaten to remove a large number of stations from the nation's airwaves.

IV. THE FCC SHOULD ADOPT CLEAR RULES LIMITING FUTURE JSAS AND SSAS.

While the FCC must balance the need to curtail new Service Agreements with the need to protect TV service in local markets, that should not stop the agency from adopting rules designed to stop the spread of these agreements for the largest station groups that already have abused the FCC's acquiescence and non-enforcement of the duopoly rule. At this point, the only additional regulation the FCC has proposed is a reporting requirement for SSAs.[12] BCI submits that this is not enough, and that the FCC should take at least two additional steps in this proceeding.

First, the FCC should establish clear rules for circumstances under which Service Agreements are acceptable. The FCC indicated in the *NPRM* that it needs to study SSAs further before regulating them. But many, many such agreements have been approved by the FCC in the past as part of TV station transactions, so the FCC already has those agreements on file for study. Developing rules for what is and is not acceptable should not await future periodic reviews. It should be undertaken in this proceeding. Since the FCC already has indicated it does not expect to reach a decision in this review before 2016, the agency has more than enough time to review agreements that already are on file and establish rules in this proceeding. If necessary, the FCC can release a further notice of proposed rulemaking outlining such rules.

As the FCC has recognized, JSAs implicate the duopoly rule by essentially allowing one station to control another in markets where they wouldn't be permitted to own that station.[13] SSAs create the same danger. Thus, the rules governing JSAs and SSAs should reflect the same

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12 *See FNPRM*, 29 FCC Rcd at 4518-4526 ¶¶ 320-339.

13 *See id.* at 4533 ¶ 350.

types of limitations and exceptions that currently exist for the duopoly rule. For example, it may be that somewhat less demanding versions of the "top 4, 8 voices test" and "failed" or "failing" station standards should set the boundaries for determining when a Service Agreement is acceptable. In any case, any rules the FCC adopts should allow JSAs or SSAs in cases where a station is in financial peril and may go off the air absent a JSA or SSA relationship.

Second, the FCC should explore establishing an absolute numerical limit on the number of Service Agreements that any single station group may hold Such a limit would ensure that station groups cannot use Service Agreements to gain or maintain the national scope that allows them to ignore some of their local markets in furtherance of nationwide goals like higher advertising revenues or higher retransmission consent fees.

In the event that the FCC does not consider itself to be in a position during this periodic review to adopt a final cap on the number of Service Agreements one station group may hold, it should consider adopting an interim cap pending final rules. An interim cap, coupled with a requirement that any new Service Agreements must be reported would at least ensure that only a limited number of agreements will be created while the FCC considers adopting a numerical cap. While final rules on a Service Agreement cap may require extensive inquiry and FCC analysis, BCI suggests that an interim cap of 15 such arrangements, with no more than 3 in the Top 30 markets, would be a reasonable place to draw the line for an interim cap. Any party that already has more than this number of Service Agreements would be prohibited from creating new ones until the FCC settles on final rules.

A cap of 15 Service Agreements would permit station groups to realize extensive scale without allowing them to become so big that any single market would be an afterthought, as may be the case today. This approach would promote the FCC's localism and diversity policies without unduly disrupting broadcasters' reasonable business expectations or local service in any market.

The two steps BCI advocates to address JSAs and SSAs are necessary to ensure that the duopoly rule serves its intended purpose of promoting localism, diversity, and fair competition in local television markets. For too long station groups have abused that rule, and television viewers are paying the price for some broadcasters' strategy to avoid valid FCC regulations. These are important steps for the FCC to take to protect local television viewers and competing local stations that have played by the rules.

V. THE FCC SHOULD PROHIBIT STATIONS FROM ACQUIRING MULTIPLE MAJOR NETOWRK AFFILIATIONS IN MARKETS WITH ENOUGH STATIONS TO ACCOMMODATE STAND-ALONE OPERATIONS.

In the *FNPRM*, the FCC proposes not to regulate stations' acquisition of multiple major network affiliations and distribution of such network programming on multicast program streams.[14] BCI submits that this course would be a mistake because it would just permit the creation of more and more virtual duopolies. Indeed, permitting dual affiliation would just be opening up another door to abuse of the duopoly rule just as the FCC is starting to close the door to additional JSAs and SSAs. If this is the course the FCC is planning to take, it should reconsider its initial conclusion and abolish the duopoly rule now.

As with JSAs and SSAs, dual affiliations can serve communities in some cases. There currently are six major English language network affiliations: ABC, CBS, the CW, FOX, MyNetowrk, and NBC. Many smaller markets do not have enough full-power stations to support stand-alone operations for all 6 networks. In such cases, the FCC should support dual affiliations as a means to promote the maximum amount of diverse over-the-air programming is every

[14] *See FNPRM*, 29 FCC Rcd at 4398-4400 ¶¶ 66-72.

market. For example, BCI serves the Lima, Ohio market (DMA #187), which currently has just one full-power television station licensed to it. In that market, Block delivers multiple major market affiliated program streams using a combination of its full-power, Class A, and low-power stations. In Lima, there is only one full-power station, so enforcing a dual-network restriction would make no sense.

In any market with 6 or more full-power commercial stations, however, there is no reason to permit stations to stockpile network affiliations. Each time a station takes an additional affiliation, it deprives another station in the market from obtaining one. That weakens the unaffiliated stations by depriving them of the additional advertising and, perhaps, retransmission consent revenue they might realize if they were able to obtain a major network affiliation. These unaffiliated stations will likely deteriorate financially and provide lower-quality services than they could if a major network affiliation were available. When a station takes multiple affiliations despite the availability of other full-power stations, it is just gaining a duopoly by another name, and the Commission should not permit that.

Accordingly, the FCC should adopt a rule banning stations in markets with 6 or more full-power commercial television stations from acquiring more than one major network affiliation. In the event that special circumstances warrant, *i.e.* one or more stations in the market prefers to operate a station without a major network affiliation, the FCC should consider waiving the rule on a proper showing. Absent that, however, the FCC should treat dual affiliations like the virtual duopolies that they are and prohibit stations from acquiring them.

VI. CONCLUSION

First and foremost, BCI favors clear, fair, and transparent rules that are evenhandedly enforced. If the FCC decides to repeal the duopoly rule, BCI would support that course. If, however, the FCC intends to maintain the duopoly rule it should close off the old and new loopholes that permit group owners intent on evading the rule to do so with impunity. For these and the reasons stated above, BCI urges the Commission to adopt in this proceeding the rule changes described herein.

Respectfully submitted,

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August 6, 2014

EXHIBIT

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	MB Docket No. 10-71
Related to Retransmission Consent	)	

COMMENTS OF BLOCK COMMUNICATIONS, INC.

Block Communications, Inc. ("BCI") hereby files these comments in response to the FCC's *Further Notice of Proposed Rulemaking* in the above-referenced proceeding concerning amendments to the FCC's network non-duplication and syndicated exclusivity rules (the "Program Exclusivity Rules").[1]

I. INTRODUCTION

BCI supports retention of the Program Exclusivity Rules, but urges the FCC to amend those rules to ensure that local TV viewers are able to receive the same line-up of stations that they can receive over-the-air. This result can easily be accomplished by (1) adopting the FCC "alternate" proposal to amend the network non-duplication rule to reflect the same Grade B contour exception that currently is employed in the syndicated exclusivity rule; and (2) prohibiting enforcement of network affiliation agreements to the extent that they prohibit a local station from granting retransmission consent to MVPDs serving areas within their over-the-air service contour.[2]

As the parent company of a small cable system serving Toledo, Ohio, and several full-power, Class A, and low-power television stations in small markets around the country, BCI has

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1 *See* Amendment of the Commission's Rules Related to Retransmission Consent, *Report and Order and Further Notice of Proposed Rulemaking*, 29 FCC Rcd 3351 (2014) (the "*FNPRM*").

2 *See id.* at 3395. BCI also agrees that the FCC should update its Program Exclusivity Rules to reflect that the relevant service contour for the purposes of these rules is the digital "noise limited service contour" rather than the former analog Grade B contour. *See id.* at n.271.

an exceptional vantage point to observe the functioning and effectiveness of the Program Exclusivity Rules.[3] In BCI's experience, these rules can play an important role in promoting localism by guaranteeing local TV stations' ability to acquire programming without having to worry that MVPDs will import duplicating programming from far-distant markets. Ensuring exclusive local distribution of network and syndicated programming is an important part of the economics of local broadcasting, and the revenues that flow from local exclusivity should go to funding the production of local news, weather, sports, and emergency programming that are the hallmark of the exceptional American broadcasting system.

At the same time, however, the Program Exclusivity Rules should never trump reasonable viewer expectations about what stations will be available from their local MVPDs. The FCC stated long ago that the guiding purpose underlying the Program Exclusivity Rules is to "reproduce in cable households the same ability to view network programming that noncable subscribers in the same locality have."[4] In other words, consumers expect they will be able to obtain MVPD service that replicates their over-the-air experience, and the FCC's rules should not act to defeat that expectation. As the American Cable Association correctly point out, local

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3 BCI owns Buckeye Cablevision, Inc. ('Buckeye"), a small cable company that services approximately 130,000 subscribers in Northwest Ohio and Southeast Michigan. BCI's broadcast division owns Fox network affiliate WDRB(TV), Louisville, Kentucky; NBC network affiliates WLIO(TV), Lima, Ohio, and WAND-TV, Decatur, Illinois; and MyNetwork affiliates KTRV(TV), Nampa, Idaho, and WMYO(TV), Salem, Indiana. BCI also owns several Class A and low power stations through its affiliate West Central Ohio Broadcasting, Inc. These stations provide local network affiliate service to parts of rural Ohio.

4 *Teleprompter of Quincy*, 83 FCC 2d 431 ¶14 (1980) (citing Amendment of Subpart F of Part 76 of the Commission's Rules and Regulations with Respect to Network Program Exclusivity Protection by Cable Television Systems, *Memorandum Opinion and Order*, 67 FCC 2d 1303, 1305 (1978); Application of American Television and Communications Corp., *Memorandum Opinion and Order*, 47 F.C.C.2d 211 (1974); In re Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, Cable Television, *Report and Order*, 36 FCC 2d 143, 181 (1972); First Report and Order in Docket Nos. 14895 and 15233, 38 FCC 683, 720 (1965).

broadcasters have no reasonable expectation of exclusivity with respect to stations that cover their service area with a quality over-the-air signal.[5]

Today the network non-duplication rules have precisely the effect of undoing MVPD subscribers' rightful and reasonable expectation that MVPDs will offer the same channels they can receive over the air. A local broadcaster can use the FCC's rules to force an MVPD to black out duplicating network programming from an out-of-market station even when that station covers the MVPDs' service area with a high-quality over-the-air signal.[6] The rule for syndicated exclusivity is very different; local broadcasters cannot use the FCC rules to force MVPDs to black out duplicating syndicated programming from an out-of-market station if that station covers the MVPDs' service area with a "Grade B" quality signal.[7] This discrepancy creates a loophole that can be exploited by stations seeking network non-duplication protection against TV stations that should be their natural competitors.

Recognizing this problem," the FCC proposed to close the "Grade B loophole" in 1988 after readopting the syndicated exclusivity rules.[8] While the FCC never acted on that proposal, BCI has argued for years that Grade B loophole was harming consumers and should be closed.[9] The FCC should take this opportunity to protect consumers by establishing that the same

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5 *See FNPRM*, 29 FCC Rcd at 3395-96 (citing Comments of American Cable Association, MB Docket No. 10-71, filed May 18, 2010, at 67-68 (the "ACA Comments").

6 *See* 47 C.F.R. §76.92.

7 *See* 47 C.F.R. §76.106.

8 Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, *Further Notice of Proposed Rulemaking,* 3 FCC Red 6171 (1988) (the "*Syndex Reistatement Notice*").

9 *See* Comments of Block Communications, Inc., Amendment of the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71, filed May 27, 2011, at 11-12 (the "Block Comments"); Supplemental Comments of Block Communications, Inc., Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, GEN Docket No. 87-24, filed July 8, 2010.

contour-based exception applies to both the syndicated exclusivity and network non-duplication rules.

Closing the Grade B loophole in the network non-duplication rule also is necessary to protect consumers from rising retransmission consent rates that do not reflect market realities. As noted above, network and syndicated exclusivity can be important to a station's ability to capture sufficient revenue to fund important local services. The FCC's rules, however, should not encourage local broadcasters to gain super-competitive rates by excluding their natural competitors – other TV stations that can be received over the air.[10] In an effort to increase retransmission consent fees, local broadcasters now routinely invoke exclusivity against stations from adjacent markets that are available over the air. This practice is buttressed by network affiliation agreements that prohibit local broadcasters from granting retransmission consent outside their assigned designated market areas ("DMAs").[11] The Commission should take this opportunity to protect customers from rising retransmission consent rates by eliminating both of these practices.

Local broadcasters need some level of exclusivity for the American broadcasting system to continue serving viewers across the country. But fair is fair: the rules should be amended to eliminate the anti-competitive purposes to which the Grade B loophole has been put to use.

II. THE GRADE B LOOPHOLE IN THE NETWORK NON-DUPLICATION RULES IS AN ACCIDENT OF HISTORY AND SHOULD BE CLOSED.

As noted in the *NPRM*, the exclusivity protections offered by the network non-duplication and syndicated exclusivity rules differ in one important respect: syndicated exclusivity cannot be asserted against out-of market stations within those stations' Grade B

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10 *See FNPRM*, 29 FCC Rcd at 3395-96 (citing ACA Comments at 67-68).

11 *See* Block Comments at 7-8.

service contours, while network non-duplication protections can be asserted against any out-of-market station regardless of its signal coverage.[12]

When the FCC readopted its syndicated exclusivity rules with the Grade B exception, it recognized that the discrepancy with the non-duplication rules should be corrected,[13] and it sought comment changes to the rules that would close the network non-duplication Grade B loophole.[14] Yet despite the FCC's professed intention to ensure that the "network non-duplication protection . . . conform as closely as possible to our other programming exclusivity provisions,"[15] the FCC never has acted on its stated intention to synchronize the discrepancy between the syndicated exclusivity and network non-duplication rules. This has left stations free to assert non-duplication protections against stations from different DMAs, even within those stations' over-the-air service contours.

The FCC should act now to eliminate this anomaly in the rules. The Program exclusivity Rules were never intended to provide stations with exclusivity rights against competing over-the-air television signals. Viewers should have their choice of signals available over-the-air, and that choice should not be constrained by the operation of the FCC's rules. As the American Cable Association has correctly noted, local TV stations "have no reasonable expectation of exclusivity against adjacent-market stations receivable in the community over-the-air" because the FCC designed the Program Exclusivity Rules solely to "prevent import[ation of] duplicative distant signals that are not available over-the-air in the community."[16] The Grade B loophole in

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12 *See FNPRM*, 29 FCC Rcd at 3995-96; 47 C.F.R. §§ 76.156(a), 76.92(f).

13 *See* Program Exclusivity in the Cable and Broadcast Industries, *Report and Order,* 3 FCC Rcd 5299, 5315-19 (1988) ("*Syndex Reinstatement Order*").

14 *See Network Non-Duplication Notice*, 3 FCC Rcd at 6174-76, 6177.

15 *See Syndex Reinstatement Order*, 3 FCC Rcd at 5319.

16 *See* Comments of American Cable Association, MB Docket No. 10-71, filed May 18, 2010, at 67-68.

the network non-duplication rule, however, gives local stations precisely the right to accomplish that.

Closing the Grade B loophole would better reflect viewers' rightful expectations of what services they can receive from an MVPD. Those expectations historically have been developed based on which stations are available over-the-air. The syndicated exclusivity rule reflects this bedrock value by exempting from its coverage stations that place a Grade B signal over the community where the station claiming exclusivity is located. The network non-duplication rule, however, contains no such exception and should be changed.

III. THE CURRENT RULES ARE BEING MANIPULATED TO ACHIEVE SUPER-COMPETITIVE RETRANSMISSION CONSENT RATES.

The FCC last examined the Grade B loophole in the network non-duplication rule prior to Congress's enactment of the current must-carry and retransmission consent provisions of the 1992 Cable Act.[17] Three developments in the retransmission consent marketplace since 1992 have added a new urgency to eliminating the Grade B loophole. First, as Buckeye has pointed out, local stations' drive to maximize retransmission consent revenues has led them to become increasingly aggressive in asserting network non-duplication rights against stations in adjacent markets.[18] Second, national networks have steadily increased the amount of retransmission consent revenue that must be paid to the network as part of the compensation paid for network exclusivity.[19] And third, national networks increasingly prohibit stations from granting

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17 *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

18 *See* BCI Comments at 3-8.

19 *See id.* at 9-11.

retransmission consent outside the station's DMA, regardless of the extent of the station's service.[20]

These developments harm viewers in at least two important ways. The elimination of competition among stations that once competed for over-the-air viewers leads to increased leverage in retransmission consent negotiations for the in-market network affiliate, leading to higher retransmission consent rates and, ultimately, higher consumer bills. Moreover, MVPD subscribers accustomed to having a choice among network affiliates they can receive over-the-air are increasingly deprived of that choice by local stations seeking to boost their profits. The result for consumers is less choice at a higher price. This wasn't the FCC's intent in adopting the network non-duplication rule and the Commission should close the Grade B loophole to address these unforeseen consequences of the rules.

Both subscribers to BCI's cable system and BCI's broadcast viewers have suffered as a result of the Grade B loophole. As discussed in its comments in this proceeding, BCI's ABC-affiliated WAND(TV) is unable to grant retransmission consent to MVPDs serving areas outside WAND(TV)'s market but within its Grade B contour due to the combination of the FCC's rules and the terms of its affiliation agreement.[21] As its former viewers lose access to WAND(TV)'s signal, its advertising revenues are bound to decrease. And WAND(TV) is effectively prohibited from maximizing its retransmission consent revenues in significant parts of its service area. The loss of revenue suffered by WAND(TV) has a negative impact on the service the station can provide to all of its over-the-air viewers. Again, MVPD subscribers in the affected areas get less choice, while all WAND(TV) viewers must accept service that is less than it would be if the FCC's network non-duplication rule were rationalized.

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20 *See id.* at 7-8.

21 *See id*.

In addition, Buckeye's Toledo cable subscribers have increasingly been deprived of television stations from the neighboring Detroit DMA, despite the fact that many Detroit DMA stations can be viewed in Toledo.[22] BCI currently is involved in a retransmission consent dispute regarding Toledo NBC affiliate WNWO(TV). WNWO(TV) has been off the air for more than six months, depriving Toledo viewers of NBC programming. Buckeye carries Detroit NBC affiliate WDIV(TV), but is required by the network non-duplication rule to black out NBC programming, despite the fact that Buckeye's subscribers cannot view NBC programming from any source. WDIV(TV)'s noise limited service contour covers much of Toledo and its suburbs, and Toledo viewers have long had over-the-air access to the station's programming. But operation of the FCC's rules ensures that viewers cannot have access to this programming over cable even though they can receive it over the air. Again, Buckeye's subscribers have less choice and Buckeye can only restore that choice by paying retransmission consent rates that are inflated by an exclusivity rule that the FCC never intended to function in this way.

As these examples illustrate, the Grade B loophole harms all TV viewers and hamstrings many local broadcasters. The FCC should adopt the pro-consumer option in this matter and amend the network non-duplication rules to include a contour-based exception that corresponds to that included in the syndicated exclusivity rule.

IV. THE FCC SHOULD ACT TO PROTECT CONSUMERS BY ADDING A CONTOUR-BASED EXCEPTION TO THE NETWORK NON-DUPLICATION RULES AND PROHIBITING ENFORCEMENT OF AGREEMENTS THAT RESTRICT STATION'S ABILITY TO GRANT RETRANSMISSION CONSENT OUTSIDE THEIR DMAs.

While the FCC certainly should close the Grade B loophole, that won't be enough to restore viewers' choice and welfare to match their rightful expectations. The FCC also must act

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[22] *See id.* at 4-6.

to curtail affiliation agreements that restrict broadcasters' ability to grant retransmission consent within their service areas. Networks increasingly insist on contractual provisions that prohibit stations from granting retransmission consent outside their DMAs. These clauses work to defeat Congress's intent that stations be permitted to use retransmission consent revenues to bolster local service to all of their viewers. Such clauses also work to deprive viewers of choices that they otherwise would have.

BCI notes that it does not generally object to geographical restrictions in network affiliation agreements. The FCC has noted that networks have a right to control the geographic extent of the rights they grant, and BCI is not challenging that principle. Indeed, BCI submits that certain geographical limitations are part of the fabric of the local TV network/affiliate system. In the limited cases where network DMA restrictions prohibit a local affiliate from granting retransmission consent within their service area, however, such restrictions effectively prohibit local TV stations from serving the viewers they are required by their license to serve.[23] This is a nonsensical result that hurts TV viewers. The FCC must address this problem to ensure that local stations can provide the services that viewers rightly expect.

At a minimum, the FCC should amend the rules to extricate itself from enforcing network exclusivity clauses that interfere with TV stations fully serving their licensed service areas. The FCC can accomplish this by adopting an exception to the network non-duplication rule that guarantees local broadcasters the right to grant retransmission consent in any area within their service contour. The FCC also should consider declaring contractual clauses that prohibit

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[23] While the FCC relies on DMAs as a convenient proxy for a station's market in many contexts, the FCC also has repeatedly held that a station's service contour – not its DMA – provides the best approximation of its natural audience and economic market. *See*, *e.g.*, *Market Modifications and the New York Area of Dominant Influence Petitions for Reconsideration and Applications for Review*, 12 FCC Rcd 12262, 12271 (1997) (absent other market facts, Grade B coverage "is an efficient tool to adjust market boundaries because it is a sound indicator of the economic reach of a particular station's signal").

stations from granting retransmission consent within their service contours contrary to FCC policy and prohibit local stations from entering into agreements that have such restrictions. The FCC has chosen to abrogate contractual exclusivity in similar cases, even when the party granting exclusivity is beyond the FCC's jurisdiction.[24] The FCC should take a similar approach here and take whatever steps are necessary to ensure that every local station can provide full service to all viewers in its service area.

V. CONCLUSION

For the foregoing reasons, BCI request that the FCC amend its rules as described herein.

Respectfully submitted,

BLOCK COMMUNICATIONS, INC.

[redacted]

W.H. Carstensen
President
Block Communications, Inc.
405 Madison Avenue Suite 2100
Toledo, Ohio 43604

June 26, 2014

[24] Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 20235, 20235-36 (2007) (banning contracts granting cable operators the exclusive right to serve individual multi-dwelling unit buildings despite the fact that the building-owners granting exclusivity are outside the FCC's jurisdiction).

EXHIBIT

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ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	Accepted/Filed
Amendments to the FCC's Good-Faith Bargaining Rules	)	MAY - 6 2014
	)	FCC Office of the Secretary

To: The Secretary's Office

PETITION FOR RULEMAKING

BLOCK COMMUNICATIONS, INC.

W.H. Carstensen
President
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May 6, 2014

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SUMMARY

Average cable customers – particularly those in small and mid-sized markets – are being harmed by the current retransmission consent marketplace, and the FCC must do more to protect them from service interruptions and rising cable rates. Block Communications, Inc. ("Block"), proposes that the FCC adopt targeted amendments to its good-faith bargaining rules for retransmission consent to stop the most egregious cases of parties using their scale to extract non-market retransmission consent rates from smaller negotiating partners.

Since Congress adopted the retransmission consent regime in 1992, near-nationwide TV station groups and MVPDs have emerged that did not exist when Congress defined the retransmission consent market. These broadcasters and MVPDs are able to use their immense scale to force smaller local negotiating partners to accept rates that are out of line with what a healthy market would produce. The only way to solve this problem is by adopting additional objective criteria by which good faith negotiations may be judged.

Block proposes that the Commission adopt heightened good faith bargaining standards applicable to markets and situations where differentials in bargaining power make it more likely that smaller companies and their customers will be harmed by near-nationwide broadcasters and MVPDs. In retransmission consent negotiations covered by Block's proposed rules, the FCC would take a more active role in enforcing parties' statutory duty to make good-faith offers that reflect the actual conditions in the local market where carriage is at issue. In the event of a good faith bargaining complaint, these new rules would require parties to defend their retransmission consent offers based on objective criteria that must include the ratings of the TV station at issue (as compared to other TV stations in the market) and the prevailing rates for retransmission

consent compensation in the market. A finding that a party has refused to acknowledge and negotiate based on actual local market conditions would constitute *per se* bad faith negotiations. Block also proposes that the Commission adopt appropriate procedural rules to facilitate good faith complaints alleging that a party is refusing to conduct market-based negotiations, but instead is seeking to impose its scale-based leverage to achieve retransmission consent rates that do not reflect the market.

These changes are necessary to ensure that average cable customers are not subjected to service blackouts or service rate increases merely because they have the misfortune of living in a market served by a nationwide broadcaster or cable operator. These customers should be assured that the video service providers in their markets are negotiating in good faith to provide service – not seeking to shake them down for rates that cannot be justified with reference to legitimate market conditions such as broadcaster ratings or the amounts paid for other similar stations for retransmission consent. The Commission's efforts so far in the retransmission consent area are insufficient to protect consumers. More is needed, and Block proposes these changes as a strong first step.

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FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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To: The Secretary's Office

PETITION FOR RULEMAKING

Pursuant to Section 1.401 of the Commission's rules, 47 C.F.R. § 1.401, Block Communications, Inc. ("Block") hereby requests that the Commission initiate a rulemaking proceeding to amend its good-faith bargaining rules for retransmission consent of TV broadcast signals to protect consumers from the results of abusive bargaining tactics used by national media conglomerates against small and mid-sized companies in local markets. The targeted rule changes that Block proposes will restore the retransmission consent marketplace Congress envisioned by ensuring that marketplace considerations – rather than broadcaster or cable operator leverage – are the key determinant in the outcome of retransmission consent negotiations.

I. INTRODUCTION AND SUMMARY

Average cable customers – particularly those in small and mid-sized markets – are being victimized by the unfair retransmission consent negotiating tactics that are the hallmark of a growing number of TV broadcast "supergroups" and the largest nationwide multichannel video programming distributors ("MVPDs"). These tactics have led to spiraling retransmission consent rates and increasing service disruptions. The Commission must stop this cycle. Video industry observers have long acknowledged that retransmission consent rates are increasing at an alarming rate and that service disruptions are on the rise.[1] Recently, the Commission moved to address imbalances in the retransmission consent marketplace by adopting rules to limit joint bargaining by some non-commonly owned broadcasters and sought comment on the potential elimination of the network non-duplication and syndicated exclusivity rules.[2] But these regulatory actions and proposals are insufficient to keep up with the accelerating pace of retransmission consent disputes, and they fail to address the problems created by national companies using the leverage created by their national footprints to impose unfair rates on smaller local companies. Consequently, the Commission's actions and proposals so far are not enough to protect consumers in small and mid-sized markets. Block therefore submits these new, more targeted rules to combat new problems that have arisen in recent years.[3]

As both a broadcaster and a cable operator, Block is uniquely positioned to proffer a solution to the current retransmission consent market failure. Block is one of the few relatively small companies that spend about the same amount of time on each side of the retransmission consent negotiating table. On the cable side, Block owns Buckeye Cablevision, Inc. ('Buckeye"), a small cable operator serving about 130,000 subscribers in Ohio and Southeast Michigan. As a broadcaster, Block owns five full-power and several Class A and low-power

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1 *See, e.g.*, American Television Alliance, *Broken Retransmission Consent System Now Spiraling Out of Control*, Dec. 11, 2013, *available at* http://www.americantelevisionalliance.org/broken-retransmission-consent-system-now-spiraling-out-of-control/; Mike Reynolds, *Station Retrans Fees To Reach $7.6B in 2019: SNL Kagan*, MULTICHANNEL NEWS, Nov. 22, 2013, *available at* http://www.multichannel.com/distribution/station-retrans-fees-reach-76b-2019-snl-kagan/146862.

2 *See* Amendment to the Commission's Rules Related to Retransmission Consent, *Report and Order and Further Notice of Proposed Rulemaking*, MB Docket No. 10-71, FCC 14-29 (rel. Mar. 31, 2014).

3 Block would not object to consideration of these proposals in MB Docket No. 10-71, but if the Commission chooses to proceed in that fashion, Block requests that it issue a separate public notice seeking comment on Block's proposals.

television stations in small and mid-sized markets throughout the country. Each of Block's full-power stations has experience negotiating retransmission consent agreements with cable, satellite, and telco video providers of all sizes. As a cable operator, Block negotiates retransmission consent with several stations and station groups, including station groups with near-national footprints. With interests and relevant experiences on both sides of retransmission consent negotiations, Block has had a bird's eye view as the retransmission consent marketplace has changed, and, ultimately failed to serve consumers.

What Block has most recently witnessed is a new and growing problem in the retransmission consent marketplace caused by a number of large TV "supergroups" that are now using their scope and scale to extract massive fee increases from small and mid-sized cable operators for poorly-performing stations in smaller markets. These groups' game plan is simple: buy underperforming network affiliates in small and midsized markets and then demand top-of-the-market retransmission consent fees. If the cable operator resists, they pull the station's signal and wait for customer complaints to force the operator to comply with the broadcaster's demands. Since the broadcaster owns dozens of stations in markets across the country, it can spread the costs of a blackout over its entire operation. But in an affected market, every cable customer suffers. They suffer the signal outage while it lasts; then they suffer rate increases when the cable operator accepts the best deal it can negotiate.

When the largest nationwide multichannel video programming distributors ("MVPDs") deal with small broadcast companies in small and mid-sized markets, a similar dynamic emerges. The nationwide MVPDs use their leverage in an effort to depress retransmission consent fees. Customers suffer when the operator discontinues carriage, but the largest MVPDs can sustain any damage from defecting customers by spreading those losses over their several million strong subscriber bases. Statistics show that three of the four largest MVPDs are responsible for 90% of retransmission consent-related blackouts.[4] These blackouts disproportionately occur in small and mid-sized markets.[5] Of the 77 blackouts since March 2010 documented by the American Television Alliance, over 84% involved markets outside the top 30 DMAs.[6] Moreover, these blackouts frequently drag on for weeks or months. Of the twelve blackouts since October 2013, two remain ongoing, and 5 others lasted 30 days or more.[7]

Cable consumers need the Commission's protection from the vicious cycles that have fueled service disruptions and unconscionable increases in retransmission consent fees – and ultimately consumer cable rates. Block proposes that the Commission amend its good faith bargaining rules to restore bargaining parity for local broadcasters and cable operators in small and mid-sized markets by adopting objective good faith bargaining requirements that will help negotiators arrive at a fair evaluation of the value of local TV broadcast signals.

Specifically, the Commission should adopt good faith bargaining rules that require retransmission consent negotiators to make offers that reasonably reflect the market position of the TV station at issue. Supergroup broadcasters should not be permitted to buy the lowest-rated

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4 *See* Wayne Friedman, *NAB Blames 3 TV Cos. For Retrans Blackouts*, MEDIA DAILY NEWS, Sept. 11, 2013 (citing NAB claims that Time Warner Cable, Dish, and DirecTV are responsible for 90% of programming blackouts), *available at* http://www.mediapost.com/publications/article/208902/nab-blames-3-tv-cos-for-retrans-blackouts.html.

5 *See, e.g.*, *NBC Affiliate KRIS-TV vs. Time Warner Cable – Worst Programming Disputes of All Time*, FIERCE CABLE, Apr. 25, 2013 (describing 5-month standoff between Time Warner Cable and KRIS-TV in Corpus Christi, Texas), *available at* http://www.fiercecable.com/special-reports/nbc-affiliate-kris-tv-vs-time-warner-cable-worst-programming-disputes-all-t.

6 *See* American Television Alliance, Blackout List 2010-2014, *available at* http://www.americantelevisionalliance.org/media-center/. 59 of the 77 blackouts (77%) involved exclusively markets outside the top 30 DMAs. Another 6 disputes included a mix of markets both inside and outside the top 30. Even if those

7 *See id.*

network affiliate in a market and then demand the highest retransmission consent fees in that market. Likewise a nationwide cable operator should not be permitted to demand that a highly-rated local affiliate accept less compensation than the lowest-rated stations in a market. In the event of a dispute that leads to a complaint before the Commission, the rules should require parties to submit evidence on a confidential basis showing that their offers reflect actual market conditions, including the ratings of the television stations involved and the rates paid by other operators for other stations in the market.[8] Because these heightened good faith bargaining requirements are needed most where bargaining disparities are greatest, they should apply only when a local broadcaster or cable operator is negotiating with a national media company.[9] And because substantial bargaining imbalances are greatest in small and mid-sized markets, the new rules should apply only in those markets.[10]

Block's specific, targeted rules would go a long way towards remedying the market failure that is sweeping the television industry. Congress gave the FCC authority to enact good-faith bargaining rules to ensure a fair and smooth-functioning retransmission consent

8 The Commission should follow its common practice of making the most highly competitively sensitive information submitted in these proceedings available only to outside counsel to ensure that the information is not misused. *See, e.g.*, Applications of Comcast Corp. and Time Warner Cable Inc. For Consent to Assign or Transfer Control of Licenses and Authorizations, *Joint Protective Order*, MB Docket No. 14-57, DA 14-463 (rel. Apr. 4, 2014).

9 Block proposes that these rules apply only if a negotiation involves (1) an MVPD that serves fewer than 400,000 customers (*cf.* 47 C.F.R. §76.901(e)) and a the TV station group owns at least 25 TV stations; or (2) an MVPD that has more than 1,500,000 subscribers and a broadcast TV group with 5 or fewer stations. *See* Section III.A, *infra*.

10 Block proposes that these heightened good faith bargaining rules apply only in DMAs ranked below the top 30. *See* Section III.B, *infra*.

marketplace.[11] It is time that the Commission adopts rules that will ensure the honest, fair bargaining that Congress intended.

II. THE RETRANSMISSION CONSENT MARKET IS FAILING IN SMALL AND MID-SIZED MARKETS AROUND THE COUNTRY.

A. Consolidation in the TV and MVPD Industries Has Distorted the Balanced Retransmission Consent Marketplace that Congress Intended.

The Commission is well aware of the problems that have arisen in the retransmission consent market over the past several years. Retransmission consent disputes have increased in both frequency and acrimony. Blackouts are becoming more frequent as cable operators and broadcasters are increasingly unable to agree on reasonable determinations of the value of local TV broadcast signals. In this environment, balance in negotiating leverage between the broadcaster and the MVPD is the key to finding a resolution that serves consumers. Unless each side has comparable risks and rewards in a retransmission consent negotiation, one side will have a greater interest in exercising its market power than in coming to a deal that serves consumers. Congress's original scheme assumed that a rough balance of negotiating leverage would exist because MVPDs offered guaranteed access to many households while local broadcasters held exclusive rights to redistribution in their markets. Unfortunately, changes in the television industry and the failure of the FCC to keep pace with those changes have destroyed that balance, particularly in small and mid-sized markets served by small and mid-sized companies like Block.

The main culprit in creating uneven negotiating leverage for small and mid-sized companies like Block is the intense consolidation in both the MVPD and broadcast industries since Congress enacted retransmission consent in 1992. When Congress enacted retransmission consent in 1992, broadcasters were limited to owning no more than 14 stations covering 30% of

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11 47 U.S.C. §325(b)(3)(C)(ii).

U.S. TV households.[12] Today, broadcasters can own as many stations as they can buy, and if those stations operate on UHF channels, they can serve up to 78% of national TV households with superior-quality signals. The new TV supergroups that have emerged will be a permanent problem in the retransmission consent market in small and mid-sized markets. At the same time, MVPD consolidation has been equally pervasive. In 1993, the top 4 MVPDs had fewer than 25 million subscribers among them.[13] Today that figure is close to 67 million, and the consolidation is expected to continue.[14]

Nationwide TV supergroups and MVPDs destroy the balance of negotiating leverage in small and mid-sized markets because they have achieved the scale necessary to withstand or impose blackouts in any one particular market without feeling the pain that should discipline their bargaining. This gives supergroups the ability to hold out for outrageous retransmission consent fee increases, regardless of the impact on local TV viewers and it permits the largest MVPDs to drop stations as a way of forcing them into deals that do not reflect the market. In Block's experience, these groups' retransmission consent offers have nothing to do with local marketplace conditions and instead are based on the rates they have achieved in other, often incomparable markets. On the TV side, this new negotiating leverage also creates perverse incentives for nationwide supergroups that obtain high retransmission consent rates for underperforming stations that happen to be network affiliates. Because they are able to extract high rates regardless of the success of their local programming, the TV supergroups are

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12 47 C.F.R. §73.3555(d)(2)(i) (1992).

13 Implementation of section 19 of the Cable Television Consumer Protection and Competition Act of 1992, *First Report*, 9 FCC Rcd 7442, 7571 (1994) (Appendix C-8).

14 *See* NCTA Industry Data, Top 25 Multichannel Video Service Customers (2012), *available at* http://www.ncta.com/industry-data.

discouraged from improving that programming, a downward spiral that hurts localism and further damages viewers.

B. These Marketplace Distortions Negatively Impact Customers of Small and Mid-Sized Companies in Smaller Markets.

When small and mid-sized MVPDs give in to these supergroups' demands, consumers are further damaged. Due to their smaller subscriber bases, operators like Buckeye are less able to absorb fee increases without substantial corresponding rate increases. Unlike larger MVPDs, with large regional or national footprints, small and mid-sized cable operators cannot make up local losses by spreading their increased costs across millions of subscribers. Buckeye's 130,000 subscribers feel the bite of every programming fee increase. When that fee increase is dictated by an underperforming local station that had the good fortune to be bought by a nationwide supergroup, consumers are harmed, and the Commission has a duty to act to protect them.

Likewise, when a national MVPD withholds fair rates from a smaller local broadcaster or removes that station from carriage on their system, customers suffer from reduced local service or – in the event of a blackout – from no local service at all unless they switch MVPDs. Thus, the retransmission consent marketplace in small and mid-sized markets no longer reflects local marketplace conditions. It is up to the Commission to adopt rules that will restore the negotiating balance that Congress intended.

Over the past two years, Buckeye has increasingly faced supergroups moving into its Toledo, Ohio cable TV service area and their accompanying unreasonable retransmission consent demands. Most recently, Sinclair Broadcast Group ("Sinclair") purchased Toledo NBC affiliate WNWO-TV. WNWO-TV has long been a local ratings laggard, with local service that pales in comparison to WTOL(TV) and WTVG(TV) in both quality and popularity.

Nonetheless, upon acquiring WNWO-TV, Sinclair immediately demanded a 10-fold rate increase for retransmission of the station. Granting WNWO-TV's demand would have made that station the highest compensated station in the Toledo market by far, despite the fact that its ratings are lower than any other network affiliate in Toledo. And, rather than negotiate a more reasonable rate that takes account of the actual market conditions in Toledo, Sinclair simply withdrew consent, leaving Buckeye's Toledo subscribers without access to NBC programming on the cable system. The alternative of simply acceding to broadcasters' unreasonable demands would have been even less palatable to Buckeye's customers. Overpaying for retransmission of weak-performing stations skews the market and guarantees higher compensation for the other better-performing stations in the market. When one station takes more than its fair share of the retransmission consent pie, the only way to compensate for that event is to increase the size of that pie. The only way to increase the amount of money available for retransmission consent, however, is to raise customer rates. So customers pay either way: they lose services, or their rates increase. This is not what Congress intended.

Under the FCC's current rules, Buckeye has little recourse against Sinclair because Sinclair initially did not refuse to negotiate or violate any of the FCC's other specific good faith bargaining prohibitions. Eventually Sinclair unilaterally terminated negotiations and the question of whether that act constitutes bad faith is pending before the Commission.[15] But the Commission's rules don't permit an obviously aggrieved party like Buckeye to raise the fact that Sinclair has demanded compensation for carriage that is unrelated to its actual position in the Toledo marketplace. The current rules provide no forum for Buckeye to demonstrate that

[15] *See* Buckeye Cablevision v. Sinclair Broadcast Group, MB Docket No. 14-33, CSR No. 8874-C (filed Feb. 18, 2014).

Sinclair is abusing its market power and leveraging its nationwide assets to increase cable rates for Toledo consumers.

Block's television stations also have encountered difficulties obtaining fair rates for retransmission consent when negotiating against the largest cable operators. In 2013, Block's Lexington, Kentucky Fox affiliate, WDRB(TV), briefly went dark on Time Warner Cable's ("TWC") systems serving the Lexington DMA due to a rate dispute. In that case, TWC sought to use its near-nationwide footprint to force WDRB to accept retransmission consent rates that were significantly below the market rate for that community. The parties settled their dispute reasonably quickly following the blackout. Had both sides known that their negotiating positions might be subject to Commission review, however, a blackout likely would have been avoided.

As demonstrated by Buckeye's experience with Sinclair in Toledo and WDRB's experience with Time Warner Cable in Lexington, the retransmission consent market is failing in small and mid-sized communities around the country. The Commission must adopt additional rules to carry out Congress's decision that all parties to retransmission consent negotiations must conduct themselves in good faith and make reasonable offers and counteroffers designed to reach a deal.

III. THE FCC MUST ADOPT FOCUSED AND OBJECTIVE RULES TO RESTORE THE FAIR RETRANSMISSION CONSENT BARGAINING MARKETPLACE THAT CONGRESS ENVISIONED.

Congress created retransmission consent to ensure that broadcasters can negotiate for fair compensation for MVPD carriage of their over-the-air content. Congress did not intend for the FCC to regulate retransmission consent fees or to interfere unduly in parties' retransmission consent negotiations, and the FCC has wisely refrained from taking either of these paths. Instead, the FCC has implemented its responsibility to police retransmission consent negotiations by adopting few actual regulations, and instead publicly encouraging the parties to continue negotiating. In more than a decade, the Commission has denied good faith bargaining complaints that raise rate issues and provided little substantive guidance about what conduct other than that described in its *per se* rules, might actually constitute bad faith negotiations.

In the past, the FCC's hands-off regulatory posture made sense because cable operators and broadcasters were limited in size by media ownership rules and pronounced disparities in bargaining power rarely existed between local broadcasters and local cable operators. Even today, small and midsized broadcasters and cable operators with roughly equal bargaining power resolve most retransmission consent negotiations without incident. Likewise, large station groups and large cable operators with substantially equal bargaining power tend to complete deals without incident. This is why broadcasters are able to say that nearly all retransmission consent disputes are settled without any interruption in service.

In recent years, however, the landscape has changed dramatically. Unprecedented TV consolidation and the rise of nationwide TV supergroups and MVPDs have distorted the retransmission consent marketplace – particularly in small and mid-sized communities. The largest station groups and MVPDs are untethered to the on-the-ground conditions in individual markets and they use their bargaining power to make unreasonable retransmission consent demands.

The FCC should exercise it authority under the good faith bargaining provisions of the Communications Act to adopt objective rules that curtail the unfair bargaining power being exerted by large broadcast groups on small and mid-sized cable operators. These rules should be narrowly focused on remedying the specific problems that Buckeye has identified and restoring the true retransmission consent good faith bargaining environment that Congress intended.

A. The New Rules Should Apply Only in Instances of Demonstrably Unequal Bargaining Power.

In recognition of the fact that most retransmission consent negotiations are concluded without service interruptions, Buckeye proposes that the FCC adopt it proposed heightened good faith bargaining standards in cases where the bargaining power differential between the parties is manifest. Unreasonable demands and service disruptions are most likely to occur when very large TV station groups negotiate with small or mid-sized cable operators or when small broadcasters try to negotiate with very large cable operators.

For that reason, heightened good faith bargaining requirements should apply only when a dispute involves (1) an MVPD that serves fewer than 400,000 customers[16] and the TV station group owns or operates at least 25 TV stations that elect retransmission consent;[17] or (2) an MVPD that has more than 1,500,000 subscribers and a broadcast group that owns or operates 5 or fewer stations.[18] In determining whether a TV station group is covered by the rules, the Commission should count any attributable joint sales or shared services agreements with other stations to be included in the total number of stations each group owns or operates.[19] Such stations should be counted in as part of a TV station group's total number of owned or operated

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16 *See* 47 C.F.R. §76.901(e).

17 Another way to determine this threshold could be to make the rules applicable to station groups that elect retransmission consent for stations covering more than 25% of U.S. TV households.

18 The FCC generally has treated cable companies with fewer than 1,500,000 subscribers to lack bargaining power in the programming context. *See, e.g.*, In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.; For Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, 26 FCC Rcd 4238 ¶ 58 (2011) (establishing 1.5 million subscriber threshold for arbitration conditions on Comcast/NBCU merger approval).

19 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *et al.*, *Further Notice of Proposed Rulemaking and Report and Order*, MB Docket No. 14-50, *et al.*, FCC 14-28 paras. 340-267 (rel. Apr. 15, 2014).

stations even while they are within the two-year period the FCC has granted broadcasters for coming into compliance with the new JSA attribution rules.

These thresholds would guarantee that increased FCC oversight of good faith bargaining would only be triggered in situations where one party has the incentive and ability to abuse its bargaining power to extract retransmission consent rates that are based on something other than the legitimate market factors that Congress expected to govern retransmission consent negotiations.

B. The New Rules Should Apply Only in Small and Mid-Sized Markets.

The other key determinant in identifying instances of unbalanced bargaining power between broadcasters and MVPDs is the size of the market at issue. Retransmission consent disputes frequently arise in small markets because the small and mid-sized cable operators that serve those markets have relatively small customer bases and are particularly vulnerable to losing subscribers when they cannot provide over-the-air network affiliate programming. There are few small or mid-sized cable operators serving major markets at this point. Similarly, in the largest markets, even small network-affiliated TV broadcast stations generally have enough leverage to negotiate fairly even with the largest cable operators.

For these reasons, Block's proposed rules should apply only for disputes that arise in communities outside the top 30 DMAs.[20] Limiting the applicability of heightened good-faith requirements to the smaller markets where severe bargaining imbalances are most likely will ensure that the FCC does not become overly involved with retransmission consent negotiations

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[20] The top 30 DMAs are roughly those with 1,000,000 or more television households. *See* 2014 Nielsen Local Television Market Universe Estimates, *available at* http://www.tvb.org/media/file/TVB_Market_Profiles_Nielsen_TVHH_DMA_Ranks_2013-2014.pdf.

on an industry-wide basis. Instead, it can target its efforts in the areas of the country where the most extreme bad faith abuses occur and where the aggrieved parties are least likely to be able to resist outrageous demands.

C. The Heightened Good Faith Bargaining Requirement Should Focus on Objective Measures of the Market Value of TV Signals, Including the Ratings Achieved by the Station In the Market.

Under Block's proposed rules, when a broadcaster or cable operator alleging bad faith negotiations satisfies the gating criteria described above, Media Bureau staff would apply a heightened standard for analyzing whether the parties have negotiated in good faith. This standard would require that for parties to negotiate in good faith, their negotiating positions must be reasonable in light of the conditions prevailing in the market or markets where the dispute is occurring. Upon an appropriate complaint, both parties would be required to demonstrate that their negotiating positions are reasonable in light of prevailing market conditions. The parties would be permitted to defend the reasonableness of their negotiating positions with any market information that they choose to cite, but each party would be required to submit (1) the contents of their most recent offer; (2) evidence regarding their other in-market retransmission consent agreements; and (3) evidence regarding the station ratings that each television station in the market.[21] All such information could be provided to the FCC under seal to protect confidentiality provisions in existing agreements.

From this information, the FCC should be able to determine whether the parties are bargaining fairly or whether one or the other is trying to exploit bargaining leverage that has nothing to do with conditions in the market where the dispute is occurring. A big part of this

[21] Because a station's ratings can fluctuate from year to year, the benchmark for evaluation should be a three-year rolling average of local station ratings.

analysis will rest on whether the parties' contract offers are consistent with the value that the station provides to local TV viewers. The best proxy for that value is the ratings that the station achieves in the market. The more viewers a station garners, the more valuable the station is as a carriage proposing for an MVPD. To make a prima facie showing of bad faith, the party complainant would have the burden of showing that the other party's contract offers are unreasonable in light of the complainant's other deals with broadcasters or cable operators in the market and ratings achieved by the station in comparison with the ratings of stations involved in previous retransmission consent agreements. The defendant would then have the burden to show that its offers are reasonable or to prove that the complainant's offers are unreasonable. While complainants and defendants could cite whatever evidence they believed demonstrated their compliance with the good faith requirements, to prevail, a party must show that its negotiating partner's contract offers are unreasonable in light of the value of the TV station to members of the viewing public.

Assessment of this evidence will require the FCC to exercise its judgment about whether a party's retransmission consent demands are reasonable, and that judgment will necessarily be influenced by individual market factors. At the same time, the FCC's rules or order adopting the new rules should provide illustrative guideposts for the types of retransmission consent offers that would be presumptively unreasonable. For example, if a broadcaster is ranked last in ratings among big-four affiliates but nonetheless demands to be the highest compensated broadcaster in the market, such an offer would presumptively be unreasonable because the broadcaster would be demanding greater compensation than that justified by its value to customers. Likewise, if a cable operator refuses to compensate a top-ranked station with higher fees than other stations in the market, then that would presumptively be bad faith. In individual cases, these presumptions could be overcome by specific, market-based facts that a defendant can prove justify different rates than may seem reasonable in light of a station's ratings. But failing such evidence, the Commission would make a finding that the party refusing to conform its negotiating strategy to the value of a broadcast signal will be guilty of bad faith in violation of the Commission's rules.

This approach would ensure that the Commission is never called upon to approve or disapprove of the rates in a retransmission consent agreement. Instead, it would be called on to apply objective criteria to the question of whether parties are negotiating in good faith. In some cases, the Commission could determine that both parties are making reasonable offers and negotiating in good faith despite the fact that they have yet to reach an agreement. In addition, in some cases, the evidence could show that both sides are being unreasonable and negotiating in bad faith. Congress did not mandate that parties conclude retransmission consent deals, but it did require that they negotiate in good faith. Block's proposals would go a long way toward ensuring a fair deal for cable customers in small and mid-sized markets while ensuring that broadcasters realize proper value for their signals, as Congress intended.

D. The Remedy for a Finding of Bad Faith Under the Heightened Bargaining Requirements Should Be That the Party Found To Be Negotiating in Bad Faith Is Required To Make Periodic Demonstrations of Compliance With the Rules Until a Deal Is Reached.

In cases where the Commission determines that one or both parties has not negotiated in good faith under the standards proposed herein, the remedy should be that the party negotiating in bad faith should be required to provide the Commission with periodic status reports on the ongoing negotiations that demonstrate its efforts to negotiate in good faith.

Here again, the Commission would not be mandating that the bad faith negotiator enter into a particular retransmission consent agreement or adopt any specific terms for its proposals.

Instead, the party adjudicated to have negotiated in bad faith is simply required to demonstrate its good faith to the Commission until the negotiation is completed.

In cases where a party consistently or repeatedly refuses to negotiate in good faith, the Commission should consider other relief such as forfeitures or such other remedies as the Commission may fashion to protect consumers.

IV. CONCLUSION

For the reasons described above, Block urges the Commission to adopt the changes to its good faith bargaining rules advocated herein.

Respectfully submitted,

BLOCK COMMUNICATIONS, INC.

[redacted]

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May 6, 2014

[redacted]

From: Robert Johnson [redacted]
Sent: Thursday, January 15, 2015 6:05 PM
To: CommActUpdate; [redacted]
Cc: [redacted]
Subject: Re: Regulation of the Market for Video Content and Distribution - Response to White Paper #6

Public input:

My primary concern is for loss of funding of our PEG (Public, Ed, Gov) cable TV station. We receive funds through a tax on the TV cablecasting portion of local Comcast cable distribution. I expect cablecasting to disappear in the next few years as it is replaced by video distributed over IP (internet protocol), for example ROKU and other VOIP delivery. Since the data service of cable communications is not taxed, we are in danger of losing our source of funding.

We are a small station in a town of about 5000 with about 1000 cable customers. We create two channels, one primarily town business with video coverage of town meetings, select-men, advisory committee, conservation commission, school board, planning board, assessors and similar groups. The second channel shows local shows, school productions, library talks, community events and some shows from neighbouring PEG stations. Our funding covers equipment expense and approximately $25,000/yr salaries. Volunteer efforts cover most of what it takes to maintain the station. For example, my technical support contributions are entirely voluntary.

I feel what we are doing is important to keep people involved in local government and education. As newspapers get weaker, video coverage is becoming a more important news and educational link. I'm hoping we can continue to receive funding through revenue from IP and possibly satellite and RF traffic.

In this respect, it may be useful to encourage the development of community sponsored internet delivery coupled with PEG services.

Bob Johnson
Technical support
Bolton Access Television
[redacted]